SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-212
Lower Tribunal No. CF18-9111-XX

RANDOLPH MAYA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court for Polk County.
Jalal A. Harb, Judge.

May 12, 2023

COHEN, J.

Randolph Maya[1] appeals his conviction of second-degree murder in the death of his wife, Jodi Maya.[2] He raises two grounds on appeal: 1) whether the trial court

[1] Because witnesses share a common last name, for purposes of clarity we will refer to Randolph Maya as Maya and the remaining family members by their first names.

[2] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

improperly allowed the State to present a witness's grand jury testimony, and 2) whether the trial court erred in overruling Maya's objection to the prosecution's closing argument containing an alleged misstatement of the law.

Jodi Maya died from strangulation. Her death at the hands of Maya was witnessed in part by their daughter Tia, who told law enforcement and the grand jury that she heard her mother screaming for help and saying that Maya was trying to kill her. Tia went to check on her mother and saw her parents in a bathroom, with her father's back toward her. She observed her father on top of her mother, "pressed against her." Tia called 911, and law enforcement responded to the scene. While Tia denied seeing what her father was doing, she did say that after the screaming stopped, she saw her mother lying motionless. The only individuals present at the time were Maya, Jodi, Tia, and Tia's older brother, Brandon.[3]

Jodi's death occurred on September 20, 2018. Maya's trial occurred in the first week of November 2021, over three years later. As the trial approached, fifteen-year-old Tia, who had lost her mother, faced the prospect that her testimony might result in losing her father to prison.[4] In pre-trial discussions with the State and in a deposition, Tia expressed that she had very limited memory of the events leading to

[3] When law enforcement arrived at the scene, Maya initially insisted that everything was fine and that nothing unusual had happened, although his wife was near death.

[4] Tia expressed these sentiments at Maya's sentencing.

her mother's death. Efforts to "refresh her recollection" by showing her the statements she gave earlier were unavailing.

The State filed a pre-trial motion seeking to declare Tia unavailable "due to lack of memory" or, alternatively, to find that her loss of memory was feigned. The purpose of the motion was to allow the admission of her grand jury testimony.

The court deferred ruling until trial, allowing the judge to watch Tia testify and assess her credibility and apparent motivations. On the stand, Tia denied remembering much about the day in question. The court was also aware of a series of her text messages. One text she sent to her older sister, who no longer lived in the home, reiterated much of what Tia had told law enforcement. She wrote:

> And she was screaming and saying he was going to kill her. And it stopped, and then Dad walked out of the house and I saw him smoking and talking to some dude like he didn't do anything.

Tia texted her cousin, "All I know was that he was choking her."

Before the trial her father told her to make sure she told the truth, "whatever the truth is." He also told her, "My lawyers are going to ask you questions anyways, whether you know this. That, do you remember? You know, hey I was 16 years old. I really don't remember that much, you know whatever." Her brother, Hunter, suggested she avoid the trial altogether.

Based on these events and on the judge's observations of Tia while testifying, the trial court found that Tia's "memory loss" was feigned, a finding not challenged

by Maya on appeal. The court allowed the State to read her grand jury testimony into evidence. Tia was cross-examined by Maya's counsel.

Maya argues that the admission of the grand jury testimony was prejudicial error, relying on *Morton v. State*, 689 So. 2d 259 (Fla. 1997). *Morton* disallowed the introduction of prior inconsistent statements that were "otherwise inadmissible" when the State called the witness for the primary purpose of impeaching the witness. Maya argues here that the State's primary purpose for calling Tia as a witness was to impeach her by use of her prior inconsistent statements given in her grand jury testimony.

"Except as provided by statute, hearsay evidence is inadmissible." § 90.802, Fla. Stat. (2021). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2021). A party may impeach a witness by introducing statements of the witness "which are inconsistent with the witness's present testimony" (commonly referred to as impeachment by "prior inconsistent statement"). § 90.608(1), Fla. Stat. (2021). Such a statement is not hearsay because the prior inconsistent statement is not offered for the truth of the matter asserted; it is offered merely to show that the witness made a different statement at a different time. If the statement is offered to prove the truth of the matter asserted, it is being

offered as substantive rather than impeachment evidence. In that event, its admission is subject to the rules governing the admissibility of hearsay.

Courts have recognized that a jury might find it difficult to properly apply the nuances of impeachment versus substantive evidence, leading to a significant danger that a prior inconsistent statement offered for impeachment might be improperly used as substantive evidence, even when the trial judge instructs otherwise. This recognition is one of the justifications for section 90.403, Florida Statutes. Under section 90.403, a court must exclude evidence if the court finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. This would include situations in which there is a high risk a jury will not confine its consideration of certain evidence to the purpose for which it is admitted.

Under 90.403, motivation of the presenter is not a factor, only the effect of the evidence. *Morton* alters that principle slightly. The *Morton* court recognized the potential for abuse by a prosecutor who might call a witness the prosecutor expects to testify contrary to earlier statements, merely for the purpose of impeaching the witness by introducing the prior statements the prosecutor wants to get before the jury. The prosecutor's hope is that the jury will not limit its use of the evidence to impeachment but will use it also to substantively support the State's case. With that in mind, the *Morton* court held that when "a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be

inadmissible, impeachment should ordinarily be excluded." *Morton*, 689 So. 2d at 264.

In the present case, it is sensible to assume the State called Tia for the primary purpose of introducing her grand jury testimony; however, this did not violate the rule in *Morton*. *Morton* disallows evidence "otherwise inadmissible." Unlike prior inconsistent statements that may be used only for impeachment, prior grand jury testimony is not hearsay and may be used as substantive evidence.[5] § 90.801(2)(a), Fla. Stat. (2021); *Moore v. State*, 452 So. 2d 559, 562 (Fla. 1984).

Maya argues that the same policy considerations in *Morton* exist in his case, so the *Morton* rule should apply. We cannot agree. The policy *Morton* sought to

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[5] Section 90.801(2)(a) provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition[.]

A loss of memory is inconsistent with prior testimony if the loss of memory is feigned or contrived. *See Mitchum v. State*, 345 So. 3d 398, 402 (Fla. 1st DCA 2022); *see also Davis v. State*, 52 So. 3d 52, 54 (Fla. 1st DCA 2010) (holding a witness's claimed loss of memory contradicts his prior statements when the loss of memory is fabricated); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 757–58 (5th Cir. 2008) (holding under the federal version of section 90.801(2)(a) that a witness's prior statement, made under oath, can be substantively admissible if the witness feigns memory loss when testifying at trial).

enforce is that a jury is not permitted to use impeachment evidence as substantive evidence. Accordingly, the State should not be permitted to intentionally put before the jury testimony, inadmissible as substantive evidence, with the hope that the jury will not be capable of following the court's instructions that the evidence may be used solely for impeachment. In Maya's case, there is no danger the jury would be confused or improperly consider impeachment evidence as substantive evidence because the grand jury testimony was not offered as impeachment evidence; it was substantive evidence properly admitted under section 90.801(2)(a).

The second argument raised was whether the trial court erred in overruling Maya's objection when the prosecutor stated during her rebuttal closing argument, "And if you believe in your heart that the defendant is the one that did it and that it was a murder, he should be convicted." We agree with Maya that the State's comment was improper, and the trial court erred in overruling the objection. The determination of whether a juror has an abiding conviction of guilt is based upon a reasoned review of the evidence presented during the trial.

The question is whether the error was harmless. *See Cardona v. State*, 185 So. 3d 514, 520 (Fla. 2016). The harmless error "standard involves placing 'the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that

there is no reasonable possibility that the error contributed to the conviction.'" *Id.* (quoting *Ibar v. State,* 938 So. 2d 451, 466 (Fla. 2006)).

The prosecutor discussed the reasonable doubt standard during her initial closing argument and correctly articulated its burden. While the objection to the improper statement on rebuttal was overruled, the prosecutor paraphrased the jury instruction on abiding conviction of guilt immediately thereafter. This was consistent with the instruction on the law provided to the jury. We find that the isolated comment, while improper, was harmless. *See Torres-Matmoros v. State*, 34 So. 3d 83, 85 (Fla. 3d DCA 2010) ("The sole statement made by the prosecutor regarding reasonable doubt . . . was immediately corrected by the prosecutor, and, when viewed in context, was harmless beyond a reasonable doubt."); *Covington v. State*, 842 So. 2d 170 (Fla. 3d DCA 2018) (holding that prosecutor's isolated yet improper comment that was immediately clarified by a correct statement of the burden of proof was harmless).

For the foregoing reasons, the judgment is affirmed.

AFFIRMED.

STARGEL, J., concurs.
WHITE, J., concurs in result only, without opinion.

Howard L. “Rex” Dimmig, II, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and J. Wade Stidham, Assistant Attorney General, Tampa, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED